



2000

The Constitution of Civil Society


Mark V. Tushnet

Georgetown University Law Center, tushnet@law.georgetown.edu

This paper can be downloaded free of charge from:
<https://scholarship.law.georgetown.edu/facpub/232>

75 Chi.-Kent L. Rev. 379-415 (2000)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>

 Part of the [Constitutional Law Commons](#)

GEORGETOWN LAW

Faculty Publications



February 2010

The Constitution of Civil Society

75 Chi.-Kent L. Rev. 379-415 (2000)

Mark V. Tushnet

Professor of Law

Georgetown University Law Center

tushnet@law.georgetown.edu

This paper can be downloaded without charge from:
Scholarly Commons: <http://scholarship.law.georgetown.edu/facpub/232/>

Posted with permission of the author

THE CONSTITUTION OF CIVIL SOCIETY

MARK TUSHNET*

I. INTRODUCTION

Recent interest in civil society appears to have been generated in part by concern that individuals acting directly in politics are unable to control the growth of their government or the policies it adopts. Mass society, it sometimes seems, deprives each of us of the resources necessary for responsible participation in our own political governance. We find ourselves unable to perform the dual tasks of democratic citizens: prodding our government to do what is necessary to ensure social well-being, and overseeing our government to ensure that it does not degenerate into an institution driven entirely from within that follows its own rather than our directives. Invigorating the institutions of civil society, it is thought, will serve an important democratic function by enhancing our capacity to act as responsible citizens.¹ Those institutions will allow us simultaneously to stand apart from government, resisting and limiting its overreaching, and to engage in self-government through truly democratic institutions.²

* Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center. I would like to thank the participants in a Georgetown University Interdisciplinary Seminar on Trust and Democracy (1995-96) for helping me develop my ideas about the topic.

1. This Article does not distinguish between the two widely noted groups interested in revitalizing civil society, the relatively more conservative civic moralists and the somewhat more liberal communitarians. For discussions of the differences between these groups, see Linda C. McClain & James E. Fleming, *Some Questions for Civil Society Revivalists*, 75 CHI.-KENT L. REV. 301 (2000); Jean L. Cohen, *Does Voluntary Association Make Democracy Work? The Contemporary American Discourse of Civil Society and Its Dilemmas* (Nov. 9, 1996) (unpublished manuscript in author's possession).

2. As Cohen and Arato summarize de Tocqueville's analysis, "without *active* participation on the part of citizens in *egalitarian* institutions and civil associations, as well as in politically relevant organizations, there will be no way to maintain the democratic character of the political culture or of social and political institutions." JEAN L. COHEN & ANDREW ARATO, *CIVIL SOCIETY AND POLITICAL THEORY* 19 (1992); see also Tracy B. Strong, *Civil Society, Hard Cases, and the End of the Cold War*, in *TOWARD A GLOBAL CIVIL SOCIETY* 69, 71 (Michael Walzer ed., 1995) ("It is the resistance to totalization that seems to me the necessary precondition for the existence of civil society.").

The mechanisms by which participation in civil society's institutions produce citizens with the desired characteristics in their public participation are not entirely clear.³ Civil society's institutions, it is said, allow us to generate and maintain values independent of the state's influence.⁴ In Ernest Gellner's words,

Civil Society is that set of diverse non-governmental institutions which is strong enough to counterbalance the state and, while not preventing the state from fulfilling its role of keeper of the peace and arbitrator between major interests, can nevertheless prevent it from dominating and atomizing the rest of society . . . Civil Society can check and oppose the state. It is not supine before it.⁵

A paradox lies at the heart of this interest in revitalizing the institutions of civil society as a check on government: Those institutions are themselves constituted by government, not in the sense that they are called into being by government, but in the sense that their boundaries are defined by the government.⁶ In addition, the state provides institutional guarantees to ensure that civil society's institutions are viable.⁷ Civil society's institutions must have "legally

3. Margaret Levi argues that Putnam's well-received work fails to explain how participation in civil society's institutions produces such citizens. Margaret Levi, *Social and Unsocial Capital: A Review Essay of Robert Putnam's Making Democracy Work*, 24 POL. & SOC'Y 45, 46-48 (1996). The mechanism must be *indirect*, in the sense that producing such citizens is not the institutions' goal, if the argument is that participation in them has the desired effect. See Jean Cohen, *Interpreting the Notion of Civil Society*, in TOWARD A GLOBAL CIVIL SOCIETY, *supra* note 2, at 35, 38 ("[T]he political role of civil society is not directly related to the conquest of power, but to the generation of influence, through the life of democratic associations and unconstrained discussion in a variety of cultural and informal public spheres.").

4. See, e.g., PETER L. BERGER & RICHARD JOHN NEUHAUS, TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY 189-90 (2d ed. 1996).

5. ERNEST GELLNER, CONDITIONS OF LIBERTY: CIVIL SOCIETY AND ITS RIVALS 5, 193 (1994).

6. See COHEN & ARATO, *supra* note 2, at 352 (noting that "the private and even the intimate 'spheres' have always been constituted and regulated by law, even if what is constituted includes a domain of autonomous judgment that can come into conflict with the law"); *id.* at 7 ("[G]eneral laws and impartial justice are crucial to the process by which the particularistic goals and projects of associated individuals within civil society could be informed by, made compatible with, and/or generalized into the normative patterns and universal principles of modern constitutional democracies.").

7. For an introduction to the concept of institutional guarantees, see Ulrich K. Preuss, *Patterns of Constitutional Evolution and Change in Eastern Europe*, in CONSTITUTIONAL POLICY AND CHANGE IN EUROPE 95, 106-10 (Joachim Jens Hesse & Nevil Johnson eds., 1995); see also William E. Forbath, *Short Circuit: A Critique of Habermas's Understanding of Law, Politics, and Economic Life*, 17 CARDOZO L. REV. 1441, 1447 (1996) ("[S]uch associations seem rarely to flourish without some institutional role in the deliberation and bargaining that attend law and policy making Frequently, forging and sustaining such a role requires affirmative state intervention and support, often in the form of legal mandates."). Institutional guarantees are the way in which the law assists or protects civil society's institutions *as such*; otherwise, all it does is protect the rights of individuals who happen to have chosen to congregate into something we call an institution, but only as a matter of convenience.

recognized entitlements.”⁸

Laws specify what counts as a family, for example.⁹ Laws define the permissible range of activities by religious institutions. Laws directly or indirectly promote various forms of political party organization. Consider even the classic example of the institution of civil society standing apart from government: the coffeehouses where, according to Habermas, civil society first took shape.¹⁰ Perhaps in the sixteenth and seventeenth centuries people could congregate at coffeehouses created by individual initiative and operating with no government supervision. Today, however, a coffeehouse operator would have to go to the government for a license to serve food, would be subject to periodic and sometimes unannounced inspections by government health officials, and could exist only as long as zoning regulations permitted coffeehouses in the location of choice. All

8. Martin Krygier & Adam Czarnota, *Rights, Civil Society and Post-Communist Society*, in WESTERN RIGHTS?: POST-COMMUNIST APPLICATION 101, 118 (András Sajó ed., 1996) (emphasis omitted).

9. I acknowledge the controversy in the literature on civil society over whether the family counts as an institution of civil society or whether it is the expression of the individual unmediated institutionally. Compare COHEN & ARATO, *supra* note 2, at ix (asserting that civil society is “a sphere of social interaction between economy and state, composed above all of the intimate sphere (*especially the family*), the sphere of associations (*especially voluntary associations*), social movements, and forms of public communications”) (emphasis added), and BERGER & NEUHAUS, *supra* note 4, at 159 (identifying four “mediating structures—neighborhood, family, church, and voluntary associations”), and Kai Neilsen, *Reconceptualizing Civil Society for Now: Some Somewhat Gramscian Turnings*, in TOWARD A GLOBAL CIVIL SOCIETY, *supra* note 2, at 41, 44 (“By civil society . . . I mean the public space between large-scale bureaucratic structures of state and economy on the one hand, and the private sphere of family, friendships, personality, and intimacy on the other.”) (quoting Walter Adamson), with MARVIN B. BECKER, THE EMERGENCE OF CIVIL SOCIETY IN THE EIGHTEENTH CENTURY: A PRIVILEGED MOMENT IN THE HISTORY OF ENGLAND, SCOTLAND AND FRANCE 122 (1994) (quoting Hegel’s assertion that “[c]ivil society is the stage of difference which intervenes between the family and the state”), and Terry Pinkard, *Neo-Hegelian Reflections on the Communitarian Debate*, in TOWARD A GLOBAL CIVIL SOCIETY, *supra* note 2, at 113, 122-23 (relying on Hegel to treat the family as distinct from “the modern market” and “the modern constitutional state”). For purposes of this Article, it seems to me unnecessary to engage that controversy, and throughout I will treat the family as an institution of civil society. I similarly ignore the question of whether civil society’s institutions include the market or stand apart from both market and the state. For a formulation suggesting that civil society includes the market, see *id.* at 75 (quoting Gellner as asserting that civil society “ensure[s] a safe and autonomous productive zone”) (emphasis added). For an idiosyncratic definition of civil society, see Elizabeth S. Anderson, *The Democratic University: The Role of Justice in the Production of Knowledge*, 12 SOC. POL’Y & PHIL. 186, 203 (1995) (“Civil society consists of those social spaces which are universally accessible to all citizens, and in which citizens ideally interact as equals, on terms acceptable to all.”).

10. See JURGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY 33 (Thomas Burger trans., 1989); see also BECKER, *supra* note 9, at 59 (listing “[p]atriotic societies, reading clubs, masonic lodges, academies of sciences and the fine arts” as “a sample of the numerous manifestations” of the new institutions of civil society).

these modes of government regulation might be deployed to inhibit the growth of coffeehouses as locations where opposition to the government might develop.

Further, the state does, and often must, provide support for civil society's institutions. As Michael Walzer points out,

Families with working parents need state help in the form of publicly funded day care and effective public schools. . . . Philanthropy and mutual aid, churches and private universities, depend upon tax exemptions. Labor unions need legal recognition and guarantees against 'unfair labor practices,' and professional associations need state support for their licensing procedures.¹¹

On a more mundane level, a substantial part of the funding for nonprofit institutions, an important subset of the broader category with which this Article deals, comes from the government itself.¹²

The paradox then is obvious. How can civil society's institutions constrain and be a source of appropriate influence on the very government that defines the boundaries within which they may operate and assists them with institutional guarantees?¹³ The paradox of civil society's constitution by law mixes conceptual and practical concerns.¹⁴ Of course a society can have vigorous civil-society institutions, when the government, or the people acting through their government, choose to define broadly the space within which civil-society institutions can operate unencumbered. On the conceptual level, though, the very existence of a government with even unexercised power to limit civil-society institutions restricts the ability of those institutions themselves to constrain and independently influence government.¹⁵ They must, in a sense, always be looking

11. Michael Walzer, *The Concept of Civil Society*, in TOWARD A GLOBAL CIVIL SOCIETY, *supra* note 2, at 7, 23.

12. See Lester M. Salamon & Helmut K. Anheier, *The Civil Society Sector*, SOCIETY, Jan.-Feb. 1997, at 63, 63 (reporting that the nonprofit sector in the United States receives 30% of its funding from government, 19% from private donations, and 51% from fees and dues).

13. As Hegel put it, "[A]s the stage of difference, [civil society] presupposes the state: to subsist itself, it must have the state before its eyes as something self-subsistent." BECKER, *supra* note 9, at 122.

14. The paradox also helps distinguish those interested in civil society from libertarians. The former believe that institutions shape individual preferences and abilities, and can be used to discipline the government; they see a constitution's role as structuring civil society's institutions to shape preferences and abilities to constrain government. Libertarians see individual preferences and abilities as entirely self-generated, and see the role of a constitution as restricting government by ensuring that it does not intrude on a sphere of decision-making predicated on self-generated values.

15. This conceptual point is identical in structure to the Legal Realist critique of the idea of a market constituted independently of law. For a discussion in the context of discussions of the distinctions among the state, the market, and civil society, see Forbath, *supra* note 7, at 1448-52.

over their shoulders. “If we do *this*,” they must always ask, “will the government retract the freedom it has given us?” The risk alone will operate as a check on civil-society institutions.

There is a second conceptual point. At least with respect to some institutions, political parties being the most notable, the government has no choice but to act in ways that encourage some and inhibit other civil-society institutions.¹⁶ Consider for example the choice among electoral systems in which the person with the most votes in a district is elected (plurality-based systems), systems in which the person with a majority of the votes in the district is elected (majority-based systems), and proportional representation systems, in which a number of representatives are elected from each district or in nation-wide elections. Political scientists have established that the district-based systems encourage the development of two political parties that actively pursue votes, while proportional representation systems (and systems in which representatives are chosen by an absolute majority, after a run-off election if necessary) encourage the development of many major parties.¹⁷ A democratic society has to have an electoral system, and the choice it makes will produce either many parties or only two. The number of parties, in turn, can indicate the vigor with which the society’s institutions of civil society operate.

The problem I identify here occurs only when the government *must* choose a course of action that has implications for civil-society institutions. In some areas, nothing compels a choice. So, for example, governments could refrain from defining what constitutes a valid marriage, even if it conferred benefits or imposed burdens on people in marriages. It would then let anyone who claimed to be in a marriage obtain its legal benefits and bear its legal burdens. The fact that the example is extreme shows that in the real world governments will actually do a great deal to define the boundaries of civil society’s institutions.

We might reduce the scope of the paradox created by the fact that the government defines the boundaries of civil society’s institutions by imposing limits on permissible definitions. Imposing limits on government actions is, after all, what constitutions do. So, in a phrase, the Constitution might limit the way in which the

16. Political parties are ambiguously civil-society institutions because they are so closely bound up with the state’s operation. See Cohen, *supra* note 1, at 38 (including parties as part of “political” rather than civil society because they “are directly involved with state power”).

17. For a summary, see VICKI C. JACKSON & MARK V. TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 713-14 (1999).

government constitutes civil society.¹⁸ Governments might be barred from defining families as institutions one essential element of which is the existence in families at some point in the family's life-course of adults of different sexes who have the biological capacity to engage in procreative sex, for example.¹⁹ Or they might be barred from enforcing their zoning ordinances against groups that wish to conduct congregate religious services in a group-member's home. Constitutional limits on governmental power to define the boundaries of civil society's institutions might then ensure a vigorous civil society sector with the capacity to accomplish what the proponents of the revitalization of those institutions desire.

The next Sections of this Article survey contemporary U.S. constitutional law about some of civil society's institutions. I demonstrate that, whatever the theoretical possibilities might be, the actual constitutional law of the contemporary United States does little to ensure the vitality of those institutions. Under contemporary constitutional doctrine, the government has a great deal of power to regulate them. It is not simply conceptually, but practically, that they always have to look over their shoulders to see if the government is about to come down on them for actions of which the government disapproves.

Of course, there is an obvious response to the skepticism I hope to generate by this survey: To the extent that contemporary U.S. constitutional doctrine fails to protect the institutions of civil society, it is wrong. So, for example, the law of free exercise of religion, as of 2000, allows governments to regulate religious practices by means of neutral laws of general applicability.²⁰ Even if the government may do little to define religion as such, current doctrine gives government a great deal of power to define the boundaries within which religions may permissibly act. But this doctrine has been vigorously criticized, from inside and outside the Supreme Court.²¹ It might be changed by

18. The final Section of this Article briefly addresses the next level of paradox, that those who hope that the Constitution will constrain the government must somehow explain how relying on government institutions—whether the judiciary, as we ordinarily think, or any other government enforcer of constitutional constraints—to limit the government's power to define the boundaries of civil society's institution escapes, rather than recreates, the paradox that the Article's central Sections describe.

19. I am not confident that the existence-condition in the text accurately captures what is on the side that opposes same-sex marriage in the contemporary debate, but I am confident that the definition, if inaccurate, could be modified without losing my basic point.

20. See *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990).

21. For a scholar's critique, see Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990). For criticism from Supreme Court justices, see

the Court itself. And, more important, the existence of constitutional doctrine that offers little comfort to civil society's institutions does not mean that the Constitution properly understood offers similarly scant comfort.

I agree with this response, when it is taken in the right way. For me, it is not that we can hope for the modification of the doctrines that provide little protection to civil society, but that we can hope to work toward a better social understanding of what the Constitution truly means. The Constitution's true meaning is, in my view, simply independent of what the Supreme Court says about the Constitution. The Court may sometimes get the Constitution right, but the mere fact that the Court has interpreted the Constitution to mean one thing rather than another has *no* necessary relation to the Constitution's meaning.

In saying this, however, I may create another paradox. I believe that we can try to work toward a better understanding of the Constitution. But, if those who believe that contemporary institutions of civil society are debilitated are correct, through what institutions can we do so? That is, my hope must be implemented by the very institutions that, according to those concerned about civil society, lack the capacity to generate a democratic citizenry of the sort that could work toward a better understanding of the Constitution. The circle is thus closed.

Once again, I agree. The implication I draw, however, is that those concerned about the weakness of civil society's institutions are wrong. I believe that nothing other than lack of will and leadership bars us from developing a democratic citizenry capable of supporting a powerful yet constrained government. The problem, if there is one, is not institutional but political. The government may constitute civil society, but the Constitution properly understood constitutes the government, and a government properly constituted would allow the institutions of civil society to flourish.

The preceding paragraphs have been highly theoretical. The remainder of this Article works much closer to the ground. It sketches how the free expression, freedom of religion, and substantive due process provisions of the U.S. Constitution have been interpreted to define and protect families, religious institutions, non-

the opinions of Justices O'Connor, Breyer, and Souter in *Boerne v. Flores*, 521 U.S. 507 (1997), all of which urge the Court to reconsider *Employment Division v. Smith*.

political associations, and political parties.²² I have organized the discussion by topics rather than by institutions.²³ The next section examines the ways in which constitutional law *defines* civil society's institutions, and Section III examines the extent to which it allows government to *regulate* them. Section IV deals with the constitutional restrictions on government's power to give unconditional or conditional grants to civil society's institutions. The Conclusion returns to the themes of this Section, but provides some greater detail on the ways in which government's constitutional power to define and regulate civil society's institutions, while substantial, might nonetheless be limited, not so much by the Constitution, but, again paradoxically, by civil society itself.

II. DEFINING CIVIL SOCIETY'S INSTITUTIONS

We can think of the Constitution as dividing government's power over civil society into two zones. In the first, government has the *power* to act, although it need not do so, whereas in the second the government *may not* act. So, for example, some cases uphold government definitions of *family* against constitutional challenge, without holding that the government *must* define families as it has. Other cases, in contrast, find it unconstitutional for government to define *family* in a particular way. This Section aims at sketching answers to two questions. First, how large is the zone of permissible government action relative to the zone of impermissible action? The answer to this question will help us assess the degree to which the Constitution ensures a large enough domain for civil society's institutions to serve as effective checks on government power and sources of independent influence on it. Second, what principles seem to determine where the line between permissible and impermissible action is drawn? The answer to this question may suggest some of the possibilities and limits on the ability of civil society's institutions to serve as effective checks and sources of influence.

The Supreme Court has defined *family* for constitutional

22. I use the word *sketch* advisedly. I attempt to capture the mainstream of contemporary constitutional law, acknowledging that good lawyers might develop arguments showing that existing constitutional doctrinal already does—or can be changed modestly so that it would—protect civil society's institutions more effectively than my description suggests.

23. Although my primary focus is on U.S. constitutional law, I occasionally mention the treatment of civil society's institutions in other constitutional systems to indicate that nothing inherent in the concept of liberal constitutionalism dictates the particular U.S. resolution of the questions at issue in this Article.

purposes in a handful of cases, applying the Equal Protection and Due Process Clauses.²⁴ Consider first the cases allowing government to deny family status to certain living arrangements. *Village of Belle Terre v. Boraas* found no violation of equal protection principles in a town's zoning ordinance that refused to allow a group of unrelated students to live in an area zoned for single-"family" houses while allowing an equally large number of people related biologically or by adoption and other devices of family blending to live in such houses.²⁵ The Court argued that the town could rationally distinguish between the two groups of people because groups of unrelated people might reasonably be thought to produce more traffic and noise.²⁶ The town, according to Justice William O. Douglas, could "lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary."²⁷

Michael H. v. Gerald D. upheld a California statute denying a child's biological father the opportunity for a hearing when he sought to establish that the child *was* his, because, under the statute, a child born while two married people were cohabiting was presumed to be the husband's child, a presumption that could rebutted only under circumstances not present in the case.²⁸ The case arose out of a complex set of personal relationships, which some would describe as a non-standard family: the child's biological mother had an affair with the biological father while married, and continued to maintain contact with him for several years after the child's birth, including sporadic sexual and domestic relations, even while she remained married to her husband, and had sporadic sexual and domestic relations with him as well. Justice Scalia's opinion for the Court disparaged these living arrangements, suggesting without holding that it would be ridiculous for any state to treat these people as members of a single complex family.²⁹

Belle Terre, with its reliance on "family values," and *Michael H.*, with its concern about the peculiar structure of human relationships in the case, suggest that constitutional law allows governments to exclude from the category *family* relationships that fail to satisfy

24. For a relatively early but still important discussion, see Robert Burt, *The Constitution of the Family*, 1979 SUP. CT. REV. 329.

25. 416 U.S. 1, 8-9 (1974).

26. *See id.* at 9.

27. *Id.*

28. 491 U.S. 110, 131-32 (1989).

29. *See id.* at 113 ("The facts of this case are, we must hope, extraordinary.").

traditionalist standards. Traditionalism, that is, is the principle determining the location of the line between permissible and impermissible definitions of *family*. If so, constitutional law is an unpromising location for identifying the ways in which civil society's institutions might help us limit government's powers, because traditionalism itself will both limit government power (to what government has traditionally done), and provide the basis for some intrusions on private life that proponents of civil society might find troubling.

Cases *limiting* government power support the suggestion that traditionalism sets the limit on government's power to define *family*. For example, in denying Wisconsin the power to require that older adolescent children be sent to school because the requirement violated the Free Exercise Clause,³⁰ the Court pointedly observed that the religious group offering the objection, the Old Order Amish, adhered to traditional values with respect to child-rearing and social productivity,³¹ contrasting the group with recently created groups that held merely philosophical beliefs opposing public education.³²

The only case directly rejecting a locality's restrictive definition of *family* has the same structure. The City of East Cleveland adopted a zoning ordinance that had the effect of making it impossible for a grandmother to live in the same household with the children of her two daughters.³³ Most observers believe that this effect was inadvertent,³⁴ but the city defended its ordinance on the ground that it was entitled to exclude extended families like the Moores from its legal definition of *family*. The Supreme Court disagreed, in a fractured opinion. Justice Lewis F. Powell's plurality opinion restated the traditionalist theme: the Moore family was not nuclear in the most restrictive sense, but it obviously was a representative example of a

30. See *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972).

31. See *id.* at 212-13 (asserting that "[t]he evidence . . . showed that the Amish have an excellent record as law-abiding and generally self-sufficient members of society"); see also *id.* at 222 (asserting that the "members [of the Amish community] are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms").

32. See *id.* at 235 ("[W]e are not dealing with a way of life and mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life.").

33. See *Moore v. City of East Cleveland*, 431 U.S. 494, 496 (1977).

34. Chief Justice Burger's dissent, resting on the legally peculiar ground that Moore should have sought a variance before challenging the ordinance's constitutionality, is probably best understood as predicated on the assumption that the city really did not intend the effect its ordinance had. See *id.* at 521 (Burger, C.J., dissenting) (referring to the case as one "which could have been disposed of long ago at the local level").

long-standing practice of child-rearing in extended families. According to Justice Powell, the city could not constitutionally adopt the most restrictive definition of nuclear families; instead, the Constitution required it to treat the living arrangements adopted by the Moores as a family.

So far it would seem that the Constitution places only a traditionalist limit on government's ability to define *family*. If so, one would expect the families that the government recognizes to reproduce rather than to limit traditionalist practices by government. There is, however, one important exception to this picture. *Department of Agriculture v. Moreno* found unconstitutional a federal statute denying federal food stamp benefits to unrelated people living together in what were understood to be "hippie communes" even though people living in families with the same number of members received the food stamps.³⁵ According to the Court, the statute was motivated by simple dislike for a class of people, and simple dislike could never provide a constitutionally acceptable reason for denying a governmental benefit.

Moreno could readily be dismissed as an aberration, but for the fact that it played a significant role in the Court's far more important decision in *Romer v. Evans*.³⁶ There, a solid majority of the Court found unconstitutional a Colorado constitutional amendment that, as the Court interpreted it, denied gays and lesbians the opportunity to claim the ordinary protections of law available to every other citizen.³⁷ The Court invoked *Moreno* in finding the amendment unconstitutional because it was motivated by sheer dislike of gays and lesbians.³⁸

Taken together with the Court's privacy jurisprudence, *Romer* seems to provide a reasonably firm foundation for arguments that states may not refuse to treat same-sex couples as families.³⁹ As Professor Cass Sunstein suggested before *Romer* was decided, one might attribute the tradition-oriented decisions to the fact that the

35. 413 U.S. 528, 534 (1973) ("If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.").

36. 517 U.S. 620, 634-35 (1996).

37. It is well-known, of course, that this characterization of the amendment may be inaccurate, and indeed the Court's opinion is quite obscure on whether, or on the extent to which, its opinion rests importantly on this characterization.

38. 517 U.S. at 634-35.

39. See generally WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996).

constitutional provision invoked was the Due Process Clause, and explain tradition-rejecting decisions on the ground that the Equal Protection Clause's function is to ensure that legislatures not enforce traditionalism so as to discriminate as social change occurs.⁴⁰

It would go beyond the bounds I have set for this Article to develop in detail the arguments and counterarguments on this question. Instead, we should think about the claims regarding same-sex marriage in the context of the larger issue of the role of civil society's institutions in disciplining government. The Supreme Court's modern privacy jurisprudence began with *Griswold v. Connecticut*.⁴¹ Justice John Marshall Harlan concurred in the majority's decision finding unconstitutional a statute that made it an offense for a married couple to use contraceptives. In explaining his position, Justice Harlan made it clear that the due process principles on which he relied, which were oriented toward making it impermissible for states to ban practices widely protected by the values of a traditionalist society, did not imply that states could not ban homosexual conduct.⁴² Thirty years ago, that is, the claim that the Constitution required states to recognize same-sex marriages was so far off-the-wall as to be almost inconceivable.

Romer enhances the credibility of the legal case for same-sex marriage. What was unthinkable a short time ago has become not merely thinkable, but actually rather plausible. And yet few would confidently predict that the Supreme Court will follow the logic of the arguments for same-sex marriage in the next few years.

The question to ask in the context of this Article is: What produced this combination of legal possibility and legal unlikelihood? And the answer is obvious: the gay rights movement, and the backlash against it. Here we see a concrete manifestation of the paradox of using civil society's institutions to discipline government.

40. See Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163-64 (1988).

41. 381 U.S. 479 (1965).

42. See *id.* at 500 (Harlan, J., concurring). This opinion incorporates by reference Justice Harlan's dissenting opinion in *Poe v. Ullman*, in which he stated, "I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced." 367 U.S. 497, 552 (1961) (Harlan, J., dissenting). I should note, however, that Justice Harlan's opinion in *Griswold* does not cite this page of his *Poe* dissent. Justice Arthur Goldberg's concurring opinion in *Griswold* does cite the sentences that follow the one I have quoted, whose content indicates that Justice Goldberg would not have upheld a claim that homosexual conduct was constitutionally protected. See *Griswold*, 381 U.S. at 499 (Goldberg, J., concurring).

Those institutions, taking the form of the gay rights movement, did indeed open up the possibility of a form of discipline: Perhaps government cannot define *family* to exclude same-sex relationships. But those institutions, taking the form of the backlash, also limit that possibility. And, of course, the one civil-society institution that *cannot* serve to discipline the government in its definition of *family* is the family itself, because that is the object of the controversy.⁴³

Romer opens up some space for insisting that government's definitions of *family* cannot be entirely traditionalist, and thereby opens up some space for the constitutionally-protected family to be a source, independent of tradition, on government power. But, I believe, that space is rather small. *Belle Terre*, *Michael H.*, and even *Moore* are, in my view, far more representative, and suggest that the domain of the constitutionally protected family is not large enough to support robust civil-society institutions to discipline government.⁴⁴

III. REGULATING CIVIL SOCIETY'S INSTITUTIONS

Describing contemporary constitutional doctrine about the government's power to regulate civil society's institutions requires that we draw a large number of distinctions. A catalogue with illustrative examples may be a helpful introduction to the descriptive survey.

(1) Government may seek to regulate an institution's external acts, that is, what it does in the public domain. A state may seek to prohibit or regulate a religious institution's practices, directing that it preserve its original building's facade in the course of a renovation because the facade is part of a historic preservation district. It may bar the religion's adherents from engaging in ritual slaughter or consumption of illegal drugs.

(2) Government may seek to regulate an institution's internal

43. Religion, or more properly *religions*, are the other institutions of civil society where definition can be important. Many non-U.S. legal systems have processes for registering religious organizations, and for distinguishing among types of such organizations. For an overview of some of these systems, see JACKSON & TUSHNET, *supra* note 17, at 1155-56 (describing the Greek system), 1245-46 (describing the Russian system). U.S. constitutional law has been more reluctant to define institutions as religious or not. See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1543-46 (3d ed. 1996) (describing U.S. cases and commentary). Instead, where non-traditional religions and their practices are involved, the courts typically assume that the organizations are religious and then find constitutionally permissible the regulations in question. For a discussion of the standards applied in such cases, see *infra* Section III.

44. Again, beyond the discipline imposed by tradition itself.

operation, that is, how it acts within areas where it generally has competence. A state may seek to invoke general anti-discrimination norms to bar a religious institution from refusing to employ non-members in some jobs. Here the government seeks to regulate internal acts on general normative grounds, unrelated to the fact that the regulated institution, as part of civil society, plays an important part in a well-ordered society. Alternatively, the government may seek to regulate internal acts on the ground that the regulation, though limiting civil society's institutions in certain ways, nonetheless increases the overall ability of those institutions to control and influence government. It may object to child-rearing practices derived from religious belief, even going so far as to characterize them as child abuse, and defend its regulation on the ground that children raised in other ways will be better able as adults to participate in civil society and government.

(3) The government may seek to regulate institutions that engage in expressive activity because the government is concerned about activity conducted *through* the institution. Here it might claim that the association's actions threatened social stability, or that its decisions constituted an impermissible form of discrimination. Alternatively, the government may seek to regulate these institutions because their existence and *non-expressive* activities convey a message about which the government is concerned. Institutions that discriminate in their choice of members may not engage in any other questionable activities, but the very fact that they discriminate there may subject them to government's regulatory efforts.

Plainly, each of these regulatory efforts raises a host of constitutional questions, under several constitutional provisions. I argue in this Section that an observer (not an advocate) examining contemporary constitutional doctrine should conclude that the doctrine gives civil society's institutions some protection against intrusive regulation, but not all that much. I offer an extremely brief, though I believe accurate, survey of contemporary constitutional doctrine dealing with the regulation of families, churches, civic associations, and political parties under the Due Process Clause and the First Amendment. My conclusion is simple: To remain free of regulation, civil society's institutions must remain in government's good graces. On the whole, they must rely on government's willingness to refrain from regulating rather than being assured by constitutional law that government *cannot* regulate them. Contemporary constitutional doctrine thus does not provide

protection sufficient to ensure a robust civil society.

A. *Regulating External Acts*

We can begin with the most general statement of government's regulatory power. As a general matter, *no* civil-society institution can resist a government regulation that is, as the Court has put it, a neutral regulation of general applicability. The case articulating this rule most clearly is the notorious *Employment Division v. Smith*.⁴⁵ As interpreted by the state supreme court, Oregon's unemployment compensation law denied unemployment benefits to workers who were fired for violating the state's prohibition on the use of certain drugs, including peyote. Smith used peyote as part of the religious observances of the Native American Church, of which he was a member.⁴⁶ He argued that the state's ban on peyote use was unconstitutional when applied to people who used the drug in religious ceremonies. The Supreme Court disagreed. According to the Court, the state was not required to provide an exemption from its neutral laws of general applicability for those who violated those laws as part of a religious practice.

Neutrality means that the regulation was not adopted with the purpose of suppressing a religious (or expressive) activity.⁴⁷ And *general applicability* means that the regulation has sufficiently broad scope to encompass a reasonable number of activities unquestionably subject to regulation because the activities implicate no values of constitutional dimension.⁴⁸

The Court's modern statement of this rule generated enormous controversy, but at its core lies an entirely sensible observation. The mere fact that an institution is religious—or, more generally, is a civil-

45. 494 U.S. 872, 878-80, 890 (1990). The Court applied this doctrine to expressive activity in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

46. For a description of the factual background of the case, see Garrett Epps, *To an Unknown God: The Hidden History of Employment Division v. Smith*, 30 ARIZ. ST. L.J. 953 (1998).

47. See *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). I have assumed in the parenthetical in the text that the Court would apply this definition, developed with respect to regulation of religion, to regulation of expression, just as it has applied the broad rule about statutes of general applicability to both religious and expressive activities.

48. A regulation is generally applicable, that is, when it is not gerrymandered so that, though written in neutral terms, its domain of application is restricted to religious or expressive activities. For an application of the anti-gerrymandering norm, see *Larson v. Valente*, 456 U.S. 228, 251-55 (1982).

society institution—tells us little about the social harm it may cause.⁴⁹ Consider, as a relatively uncontroversial example, the application of antitrust laws to media conglomerates.⁵⁰ It is indeed difficult to see why the fact that a corporate entity produces information rather than steel should matter when the harm to consumers caused by newspapers' antitrust violations is indistinguishable from the harm to them caused by steel makers' antitrust violations. Similarly, I am hard-pressed to see why a newspaper reporter should be exempt from the application of ordinary laws making house-breaking a crime simply because the reporter broke into the house to obtain information about the misconduct of public officials that readers and voters would find valuable. Experience elsewhere shows that the problems are no different when religions are involved. The Japanese experience with a religious organization that released a dangerous chemical in the Tokyo subway system should be enough to establish that the Court's willingness to allow states to apply neutral rules of general applicability to religious institutions' external activities has a sensible core.

Perhaps the cost-benefit calculation *should* differ when civil society's institutions rather than market institutions are involved, however. Surely in a particular case the social harm of house-breaking can be outweighed by the social benefit flowing from the information disclosure. The idea would be that *most* activities of civil society's institutions lie outside the core where the Court's approach makes sense. Instead of applying the general rule to *all* their activities, the state should be allowed to regulate civil society's institutions only by showing, rather than assuming, that the activities cause social harm.⁵¹ But, at least in this area, the Court has proceeded

49. I believe that some of the controversy over the Court's invocation of its approach in the religious context is that many people do not really believe that the activities the government seeks to regulate cause substantial social harm. So, for example, many think that consumption of peyote is an entirely self-regarding activity, a victimless crime; that there is rarely a strong reason for performing an autopsy on someone who died while a passenger in an automobile accident; and that the precise details of historic preservation practices could be varied without real loss to any particular historic preservation district. I share many of these views, but they are, at bottom, challenges to the government's *general* authority to adopt these regulations, and are best understood as general due process challenges or, in more traditional terms, arguments that the regulations lie outside the government's police powers.

50. See *Associated Press v. United States*, 326 U.S. 1, 7 (1945).

51. In the jargon, the state would be allowed to regulate on showing that doing so served a compelling state interest. Presumably one could deal with examples like the Japanese subway problem by finding that state regulation did so. Justice Scalia's opinion for the Court in *Smith* correctly observed that the Court's decisions strongly suggested that the Court actually applied a watered-down "compelling state interest" test in religion cases. *Employment Div. v. Smith*, 494 U.S. 872, 885-86 (1990).

on the assumption that government may use a rule-based system rather than a case-specific one (although, presumably, the government *could* always make case-specific, cost-benefit calculations). The state may adopt *rules* that satisfy the required cost-benefit calculation: A rule is constitutionally permissible when the benefits from applying the rule to the entire range of cases to which it applies exceed the costs of doing so.

The next question is then: Does the Constitution require that states adopt rules that have a restricted range? That is, assume that some particular neutral rule of general applicability does in fact satisfy the cost-benefit test. Nonetheless, there may be discrete subcategories within its applicable range where the rule does not pass the cost-benefit test. Does the Constitution require that states tailor their rules to exclude such subcategories from an otherwise permissible neutral rule of general applicability? The Court's answer has been no, largely for administrative reasons. As the Court has seen the problem, forcing the government to design rules so precisely would place too heavy a burden on government.⁵²

B. Regulating Internal Acts

Taken most broadly, the Court's approach would license a tremendous amount of apparently intrusive regulation of civil society's institutions, to the point where they could hardly serve as constraints and independent sources of influence on government at all. The classic example is the application of gender and sexual orientation anti-discrimination norms to religious institutions. Perhaps such institutions could act as true civil-society institutions if they were barred from discrimination against women or gays and lesbians in their non-religious activities, for example, in the employment of maintenance workers for their churches.⁵³ But it would severely undermine their ability to do so if they were unable to

52. This may be one defense of the otherwise peculiar exception to the "neutral rules" holding in *Employment Division v. Smith*. See *id.* at 878-80, 890. Under that exception, a state may be required to exempt religious objectors when it has in place a system for making other individual exceptions to the general rule. Perhaps this can be justified on the ground that by creating the mechanism for individualized determinations, the state itself has demonstrated a willingness to perform case-specific, cost-benefit calculations.

53. The Court, however, has expressed sympathy with the congressional judgment that it would be overly intrusive for a government agency to determine that some facet of a church's operation was peripheral to its religious mission. See *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 329-30, 336 (1987). The *Bishop* decision upheld a congressional decision to defer to church choices, and does not indicate what the Court would have done had Congress chosen to be more intrusive. See *id.* at 339.

enforce religiously determined discriminatory choices at the core of their activities, as in the selection of ministers.

I believe the intuition is so widespread that the Constitution should preclude a government from invoking its nondiscrimination norms against core practices of civil-society institutions.⁵⁴ The route to defending that intuition is reasonably clear: the distinction, suggested at the outset, between regulation of external and internal activities. Yet, even if we invoke that distinction, room remains for a substantial amount of government regulation of internal activities.

We can begin by noting that, for many, civil society's institutions are instrumentally valuable. They believe government should refrain from regulating those institutions because the institutions help create a well-governed society. One might then note, however, that not all civil-society institutions are instrumentally valuable in that way. Their internal activities may produce people who are unable to function well as citizens in a democratic society.

In the *Yoder* case, discussed earlier, Wisconsin urged the Court to allow it to require high-school education for adolescents because enough Amish children were likely to leave their communities to make it a matter of social concern that they be able to participate as effective citizens.⁵⁵ The Court rejected the state's argument, but only because, as the Court saw it, the state had not established the factual predicate on which it relied.⁵⁶ According to the Court, the Amish educated their children well enough so that even those who left the community could participate in the wider society.⁵⁷

As a matter of principle, state regulation of the internal activities of civil society's institutions might be justified on civil society grounds: Regulation would be allowed when it maximized the instrumental effectiveness of those institutions.⁵⁸ The state might seek to prohibit practices that so demoralize some community members that they are disabled from acting as responsible citizens. I have in mind abusive child-rearing practices, for example, and some forms of discriminatory treatment of women who find themselves more or less confined to particular civil-society institutions.

54. That intuition is widely held, although I should note that nothing in the Court's decisions strongly suggests that the Constitution does so.

55. *Wisconsin v. Yoder*, 406 U.S. 205, 224 (1972).

56. *See id.* at 224-25.

57. *See id.* at 225.

58. Or, perhaps more narrowly, when it offset some institutional practice that reduced the institution's instrumental effectiveness.

The Supreme Court has not addressed these issues directly. It seems worth pointing out, however, that it would not have to do so if it rejected the posited distinction between regulation of external activities and regulation of internal activities. Further, the idea that legal doctrine could stably distinguish among internal activities that reduce civil society's effectiveness and those that promote it seems strained. Consider, for example, the argument that discrimination against women with respect to occupying positions of religious authority might reduce the ability of women to act as effective citizens. One need not find this argument compelling to acknowledge that some legislatures might at some point reasonably accept it. And, if they do, the only reason the Court might give for rejecting it would be that legislatures have to respect the internal operation of civil society's institutions *in toto* and cannot respect some while regulating others. Yet, as we have seen, that is precisely the argument rejected in the *peyote* case. I conclude, then, that it is unlikely that constitutional doctrine would allow regulation of external activities under the *Smith* rule but bar regulation of internal activities in the face of a legislative determination that regulation is desirable. Once again, civil society's institutions are likely to be more dependent on legislative grace than protected by constitutional law.

C. Regulating Expressive "Acts"

One line of cases provides some modest collateral support for the argument I have made about regulation of internal activities for civil-society related reasons, and expands our view to incorporate regulation of expressive activities. These are the cases allowing governments to enforce their anti-discrimination statutes against some private associations. For example, *Roberts v. U.S. Jaycees* found no constitutional violation in the application of a state's anti-discrimination statute to the membership policies of a private association that, as the Court understood it, played a significant role in providing members with commercial and other opportunities.⁵⁹

59. 468 U.S. 609, 612, 626 (1984). The Court subsequently invoked *Roberts* to reject constitutional challenges in *Board of Director of Rotary International v. Rotary Club*, 481 U.S. 537, 544-49 (1987), and *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 12 (1988). These cases explored the limits of the category of private associations that the state might properly regulate. Conceding that some associations are so intimate that regulation would be unconstitutional, the Court in *New York State Club* upheld a statute banning discrimination by any association with more than 400 members, providing regular meal service, and regularly receiving payment from nonmembers.

One reason sometimes asserted for applying these statutes to such associations is civil-society related: Their existence and practices disempower women and others not entitled to membership, not by denying them concrete business opportunities, but by reinforcing social understandings that women are not full members of the public sphere.⁶⁰

Seen in this way, *Roberts* might be thought to raise substantial freedom-of-expression problems. Suppose the association adopted its discriminatory policies precisely *because* its members believed, and sought to communicate, that women should indeed not be full members of the public sphere. Banning discriminatory practices would then seem hard to distinguish from banning a speaker because the state disagreed with the message the speaker sought to convey, a core violation of the First Amendment. And so indeed the Court held, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*.⁶¹ There the state supreme court held that the group organizing Boston's St. Patrick's Day parade provided, in the parade, a place of public accommodation, and that the organizers had to allow representatives of gays and lesbians to participate in the parade under their own banner because state law prohibited discrimination against gays and lesbians in places of public accommodation. Justice David Souter, writing for the Court, emphasized the expressive purposes of parades. Requiring the parade organizers to allow people with whom they disagreed to march would "alter the expressive content" of the parade.⁶² Justice Souter's opinion cited *Roberts* for a quite general proposition, but did not expressly distinguish it. Yet the opinion makes the distinction clear. Parades of the sort involved in *Hurley* have few purposes, if any, other than expression, sometimes diffuse expression—communicating a general feeling of community definition—but expression nonetheless. The First Amendment interest must prevail over the non-constitutional interest in eliminating discrimination where activities that are nearly exclusively expressive are involved.⁶³ The Jaycees and other civic associations, in

60. For a critique of a broad interpretation of *Roberts* along these lines, see NANCY ROSENBLUM, *MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA* (1998). Rosenblum argues that regulation of decisions to exclude from membership may be justified when they reinforce a status of second-class citizenship. *Id.* at 167. *Roberts* may fairly be read to adopt such a rationale. For a critique of Rosenblum's argument, see Stuart White, *Equal Opportunity and the Right to Exclude*, in *THE GOOD SOCIETY* 1, 54 (1999).

61. 515 U.S. 557, 572-73 (1995).

62. *Id.*

63. The opinion in *Hurley* pointed out that those seeking access to the parade did not press

contrast to the organizers of the St. Patrick's Day parade, could not plausibly claim that *all* they did was communicate a message about women's proper place even though they could claim that their membership policies did at least that.

The point of this analysis is to establish how small the domain of protection against regulation is. After all, as political theorist Nancy Rosenblum points out, associations like the Jaycees may not do much in the way of expression, but their members might, and what their members say might be influenced to some degree by the associations they acquire through membership in the Jaycees.⁶⁴ Yet the Court's constitutional analysis appears to be unresponsive to these indirect expressive effects of civil-society institutions. In contemporary constitutional doctrine, only those civil-society institutions whose exclusive (or nearly exclusive) purpose is to express some view may claim exemption from regulations instrumental to the goal of maximizing the effectiveness of civil society. Also, importantly, the standard argument for the instrumental value of civil-society institutions is that such institutions, though created for purposes other than controlling government, have the valuable indirect effect of shaping citizens with the capacity to control it.⁶⁵ Yet contemporary constitutional doctrine appears to permit substantial regulation of exactly such institutions.

Something similar might be said about other civil-society institutions. Consider colleges and universities, for example. In spite of a large literature urging that such institutions should have a constitutionally protected domain of academic freedom,⁶⁶ the Supreme Court has never endorsed that claim.⁶⁷ In other settings, institutional interests may simply be derivative of individual ones, so

an equal protection claim. *Id.* at 566.

64. ROSENBLUM, *supra* note 60, at 194-211.

65. Such indirect effects played a large role in civil society's emergence: People did not go to coffeehouses merely to discuss politics, but the experience of going to coffeehouses changed the way people understood their relation to the state.

66. It is worth noting, of course, that public colleges and universities are not obvious candidates for inclusion in the sphere of civil society anyway, and working out a theory of academic freedom for them is particularly difficult.

67. The most eloquent support for the claim is provided by Justice Felix Frankfurter's concurring opinion in *Sweezy v. New Hampshire*, 354 U.S. 234, 261-63 (1957) (Frankfurter, J., concurring in the result). Justice Lewis F. Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 311-15 (1978), treated academic freedom "as a special concern of the First Amendment," *id.* at 312, but did not defer to the university's judgment that its affirmative action program was necessary to accomplishing the academic goals it sought. I find it hard to see a constitutionally protected interest in academic freedom at work in Justice Powell's opinion.

that the fact that individuals have come together in civil-society institutions has no bearing on the constitutional analysis. In such settings, the institutions are protected not because they are civil-society institutions but because the Constitution protects *individuals'* rights.

Political parties provide my final example of (ambiguously) civil-society institutions. Their activities substantially affect the way in which the government is organized. Giving the government extensive power to regulate political parties would obviously have a substantial self-reinforcing effect: Governments would regulate parties in ways that ensured that parties would do little to change the way government operated. Yet this is close to what the law of political party regulation is.

The Court has provided parties some protection against regulation. Political parties are associations of like-minded people, and their very existence, the Court has said, "presupposes the freedom to identify the people who constitute the association."⁶⁸ Some internal party arrangements are thus free from state regulation.⁶⁹ The Court has held that a state may not require that parties conduct primary elections in which only registered members of the party can vote.⁷⁰ Also, the Court has invalidated a statute barring political parties from endorsing or opposing candidates in primary elections.⁷¹ In doing so, the Court specifically rejected the state's argument that the regulation maximized civil-society interests by ensuring that a party not pursue a self-destructive course.⁷²

But these protections are modest indeed. The Court's most recent formulation describes a two-stage balancing process:

When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the

68. *Democratic Party of the United States v. Wisconsin*, 450 U.S. 107, 122 (1981). *Democratic Party* held unconstitutional the state's requirement that delegates to a national party convention cast their votes in accordance with the results of the state's "open" primary election, in which nonmembers of the party could vote, when that requirement conflicted with the national party's rules.

69. In addition, a series of decisions limits the states' power to exclude third parties from the general election ballot. See, e.g., *Anderson v. Celebrezze*, 460 U.S. 780, 805-06 (1983).

70. See *Tashjian v. Republican Party*, 479 U.S. 208, 201-11 (1986) (involving a statute barring independent voters from participating in a party's primary). *Cool Moose Party v. Rhode Island*, 183 F.3d 80, 88 (1st Cir. 1999), extends the *Tashjian* holding to prohibit statutes from denying parties the opportunity of voting in their primary to voters registered in *other* parties.

71. See *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 216 (1989).

72. See *id.* at 227-28 ("[E]ven if a ban on endorsements saves a political party from pursuing self-destructive acts, that would not justify a State substituting its judgment for that of the party.").

character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.⁷³

For present purposes, and again stressing that I am interested in describing contemporary constitutional law rather than advocating its development in a more civil-society protective direction, there are two important points about the law of political party regulation. First, on the general methodological level, any test, like the Court's, involving important elements of balancing provides insecure protection for the objects of regulation. They can never know how a court will strike the balance, and thus can rarely operate free of concern that their activities will trigger government intervention that the courts will find on balance justified. Second, more specifically, the Supreme Court has found that states can permissibly pursue policies of protecting the present two-party system against erosion.⁷⁴ As critics have observed, this allows the kind of "lock-in" of existing power-holders that advocates of a robust civil society fear.⁷⁵

D. Conclusion

Taken in the aggregate, the limits contemporary constitutional doctrine places on government's ability to regulate civil society's institutions are insubstantial. The Constitution allows government to constitute civil society in the image it prefers, which frequently will be its own image. To that extent, the Constitution as currently interpreted does not do the work that civil-society enthusiasts demand.

73. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-59 (1997) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

74. *See id.* at 367 ("[T]he States' interest permits them to enact reasonable election regulations that may, in practice, favor the traditional two-party system.").

75. *See, e.g.,* Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331, 343-44; Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 668-69 (1998).

IV. "HELPING" CIVIL SOCIETY

This Section describes the constitutional doctrine that applies when governments deliberately set out to support civil-society institutions. I distinguish between programs providing unconditional support and those providing support on condition that the institution comply with some government-specified requirements. I note at the outset that this Section fits awkwardly into the Article as a whole. After all, governments support civil-society institutions only when they choose to do so.⁷⁶ Yet, it is hard to see how institutions that flourish only because government assists them can serve as robust sources of constraint and independent influence on government. To that extent, the constitutional doctrines discussed in this Section may be irrelevant to my larger theme. Even with that qualification, however, I believe it helpful to examine the law of government assistance, because it illustrates, once again, how little contemporary constitutional doctrine does to ensure that civil society's institutions have the capacity to act as constraints and independent influences on government.

A. *Assisting Substantive Activities*

In examining programs of government assistance to civil-society institutions, we must distinguish between assistance provided *because* an institution is part of civil society and assistance provided because the institution *does* something substantive the government regards as valuable (its role as an institution of civil society aside), and also between programs of general assistance and selective programs.

The government's power to assist institutions in performing what we might call their substantive activities is both substantial and largely uncontroversial.⁷⁷ Examples of such assistance are grants to faculty members at religiously affiliated universities to perform scientific research, or grants to such universities to construct buildings housing scientific research centers,⁷⁸ or contracts reimbursing

76. With the exception of cases in which the government's decision to support *some* institutions requires it to support others. See *infra* text accompanying notes 82-85.

77. See Martha Minow, *Choice or Commonality: Welfare and Schooling after the End of Welfare As We Knew It*, 49 DUKE L.J. 493 (1999), for a helpful overview of the constitutional issues discussed in this Section.

78. *Tilton v. Richardson*, 403 U.S. 672 (1971), upheld a federal statute providing grants for the construction of buildings for non-religious programs at religiously affiliated colleges and universities. (It invalidated the program only to the extent that the program allowed buildings constructed with federal financial assistance to be converted to religious purposes after 20

religiously affiliated hospitals for their costs in caring for the needy. By strengthening civil-society institutions in their substantive activities, these programs do promote the indirect citizen-shaping functions that make such institutions instrumentally valuable.

Grants to civil-society institutions *because* they are such institutions may be more problematic. Of course there is no doubt that a family-assistance program providing a direct financial award to each grouping defined as a family is constitutional.⁷⁹ Grants to religious institutions are, however, more problematic. The Establishment Clause may stand as a barrier to a certain class of grants. Today the relevant doctrine is in flux, but so far the Court has refrained from holding that financial assistance provided directly to religious institutions is constitutionally permissible. The apparent limitations on the holding in *Rosenberger v. Rectors and Visitors of the University of Virginia* are instructive.⁸⁰ The case involved student activity fees collected by the university and distributed to student organizations. Relying on a strong state policy against supporting religion, the university refused to make these funds available to support the publication of a student magazine that discussed a range of issues from a Christian point of view with the aim of converting readers to Christianity. Over four dissents, the Supreme Court found the university's conduct to violate the Free Speech Clause of the First Amendment because it denied access to an otherwise generally available fund on the basis of the magazine's content. The university contended that the Establishment Clause undermined the free speech objection, but the Court disagreed. Yet in doing so Justice Anthony Kennedy's opinion for the Court reaffirmed a long-standing rule that direct monetary support *to* religious institutions *for* their religious activities was unconstitutional.⁸¹ The opinion also emphasized that the magazine itself did not even receive any money from the student activity fund; rather, "the disbursements from the fund go to private contractors for the cost of printing that which is protected under the Speech Clause of the First Amendment."⁸²

years.)

79. Subject to the concerns, discussed in Section II above, about government's power to adopt restrictive definitions of *family*.

80. 515 U.S. 819, 845-46 (1995).

81. See *id.* at 840 ("The neutrality of the program distinguishes the student fees from a tax levied for the direct support of a church or group of churches. A tax of that sort, of course, would run contrary to Establishment Clause concerns dating from the earliest days of the Republic.").

82. *Id.* at 841. Justice Sandra Day O'Connor, who joined the majority opinion, wrote a

Seen in this way, *Rosenberger* may simply show that governments providing financial assistance to the expressive activities of civil-society institutions may not deny equivalent (although perhaps indirect) financial assistance to the expressive activities of religious institutions on the ground that the expression at issue is religious. Suppose, however, the government provides assistance to what I have called the substantive activities of civil-institutions. May it exclude religious ones from the program? The central example of current concern is the provision of public assistance—food banks for the poor, counseling services, and the like—by “faith-based” institutions. Unlike *Rosenberger*, the activities being funded are not themselves expressive, and any exclusion would not directly limit the amount of publicly subsidized expression. One might plausibly argue, of course, that the religious institution would be excluded from the program because its central organizing feature was religious, that is, was a form of speech. One might conclude from this that the exclusion was a form of impermissible content-based or viewpoint-based discrimination, not—again—with respect to the distribution of speech as in *Rosenberger*, but with respect to the religious institution’s civic standing. My own view is that *Rosenberger* is different because it deals with discrimination with respect to an expressive activity.⁸³ But for present purposes I think it sufficient to note that the sharp disagreement among the justices in *Rosenberger*, and the limitations suggested by Justices Kennedy and O’Connor, rather strongly suggest that the current Court would not find it unconstitutional if a legislature excluded faith-based programs from their schemes of public assistance.

It seems to me, therefore, that a legislature need not include religious institutions in general programs of assistance to the non-expressive activities of civil-society institutions. The more pressing contemporary question, of course, is whether they *may* do so if they choose. The concern is that grants to religious institutions violate the Establishment Clause. As we have seen, the Court remains

separate concurrence in which she insisted that the Establishment Clause often required that “fine distinctions” be drawn. *Id.* at 848 (O’Connor, J., concurring). One such distinction was that “the funds are paid directly to the third-party vendor and do not pass through the organization’s coffers.” *Id.* at 850.

83. A religious institution might contend that it was expressing its religious commitments *through* its substantive activities, such as aiding the poor because of a religiously-based preferential option for the poor, as in Catholic liberation theology. Here the analogy is to the limited protection civic associations get when they contend that their discriminatory membership practices express a political viewpoint.

committed to the principle that direct monetary support for the religious activities of religious institutions is a core violation of the non-establishment principle. What about monetary support for their non-religious activities?

First consider *indirect* monetary support. May a government create a program giving parents vouchers that they may use to pay tuition for their children's education, and allow the parents to use those vouchers at religiously affiliated institutions? The policy controversy over such voucher programs is substantial, but the constitutional one should not be. *Mueller v. Allen* upheld a program in which the state provided an income tax deduction for expenses associated with school attendance.⁸⁴ The deduction was available to all parents, but it was claimed predominantly by parents who sent their children to religiously affiliated schools. Although it did not use the term, which developed later, the Court treated the program as a neutral statute of general applicability, and therefore constitutionally permissible.⁸⁵ The Court also found that the program "reduced the Establishment Clause objections" by "channeling whatever assistance it may provide to parochial schools through individual parents."⁸⁶ Subsequently, the Court upheld the use of state vocational rehabilitation funds to pay the tuition at a Christian college for a visually handicapped person who was preparing to be a minister.⁸⁷ It also upheld the payment of public funds for the salary of a sign-language interpreter for a deaf student attending a Roman Catholic high school, where the interpreter communicated the content of religious instruction.

The constitutional argument against standard voucher plans approaches the frivolous in light of these cases. All involved indirect monetary support for attendance at religiously affiliated schools. *Mueller* and *Zobrest* involved support for instruction at the pre-college level. Further, both *Witters* and *Zobrest* involved support for what the Court was clearly told was instruction in religion. Perhaps the only constitutional challenge to indirect monetary support through vouchers is the imaginable but unlikely case where the *only* instruction the student receives is in religion.⁸⁸ *Mueller* described the

84. 463 U.S. 388, 402 (1983).

85. See *id.* at 398-99 ("[A] program . . . that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause.").

86. *Id.* at 399.

87. See *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 489-90 (1986).

88. Another argument against a voucher program is that in some communities vouchers

program there as advancing the state's secular interest in developing "[a]n educated populace."⁸⁹ Perhaps the reference is to a populace generally educated to civic responsibility and economic productivity, and perhaps an education devoted solely to religion would not qualify. But the class to which this problem refers must be trivially small, and its possible existence casts no doubt on the general argument supporting the constitutionality of standard voucher programs.

Slightly more problematic are programs providing *direct* monetary assistance to religious institutions. The Court has attempted to maintain a sharp line between permissible indirect assistance and impermissible direct assistance. So, for example, it noted in *Mueller* that all the relevant cases invalidating assistance programs "have involved the direct transmission of assistance from the State to the schools themselves."⁹⁰ The Court has never worked hard to justify this largely formalistic distinction, and might abandon it if pressed.

B. Assisting Religious Activities

The remaining questions, though perhaps small, are extremely interesting. Voucher programs and payments to faith-based institutions for their participation in programs of aid to the needy involve payments for the substantive activities of religious institutions, even if those substantive activities are religiously motivated. Suppose a legislature chose to assist those activities *because* they were religiously motivated. For example, some have argued that assistance to the needy is more effective in inducing permanent change in the recipient when it is accompanied by religious expression.⁹¹ Here, the ultimate reason for providing public support to the institution is a secular one—enhancing the economic position of poor people—but the proximate one is religious. There is

will be used extensively to support a narrow class of religiously affiliated schools and will thereby weaken the public school system to the point where parents who would in the abstract prefer to send their children to public school, or to a school associated with some other religious group, nonetheless find themselves effectively forced to use their vouchers to send their children to the socially dominant religiously affiliated school. For a full discussion, see Alan E. Brownstein, *Evaluating School Voucher Programs Through a Liberty, Equality and Free Speech Matrix*, 31 CONN. L. REV. 871, (1999). This problem may occur in some jurisdictions, but not in so many as to cast general constitutional doubt on standard voucher programs.

89. 463 U.S. at 395.

90. *Id.* at 399.

91. See Minow, *supra* note 77.

little law to go on here, but my sense is that contemporary doctrine allows the government to support religious institutions because they are religious, as long as its ultimate goal is secular and (perhaps) as long as it supports non-religious institutions that carry out similar but non-religious substantive programs.⁹²

Finally, what about direct monetary support for the religious activities of religious institutions?⁹³ Suppose a legislature, convinced that religious belief is instrumentally valuable in ensuring that religious institutions could serve as constraints and sources of appropriate influence on government, chooses to pay ministers' salaries. At least according to the present Court, a clearer example of a core Establishment Clause violation could hardly be imagined. I assume that the Court will continue to hold this position.

Notice then the point we have reached. Governments may promote the instrumental value of religious institutions as part of civil society *indirectly*, by supporting their substantive activities in various ways, but may not do so directly. I offer this conclusion not to criticize contemporary doctrine, but only to point out the complexities of the constitutional law that constitutes civil society.

C. Providing Selective Unconditional Assistance

Rosenberger points to the answer to the next large issue about government assistance to civil-society institutions: To what extent must government act generally, and to what extent may it act selectively, in assisting such institutions? Of course in some sense the government never acts completely generally: if the government supports programs to place children in foster care, it need not support programs to reduce alcoholism. This is true even if some civil-society institutions engage in one but not the other activity. At the other end of the scale, we might be concerned about overly narrow definitions of the government's programs: May a government support anti-alcoholism programs sponsored by general civic associations such as the Chamber of Commerce but not similar programs sponsored by

92. I am cautious about the latter qualification because, by hypothesis, religious institutions are more effective than non-religious ones in advancing the government's secular goals, and I am not sure that the law would or should require the government to dilute the effectiveness of its investment by disbursing money to institutions that use it less effectively than others.

93. I take it to be worth no more than a note to point out that all forms of assistance, monetary and nonmonetary, direct and indirect, to a religious institutions' substantive activities provide indirect monetary support for their religious activities by freeing funds up for those activities.

veterans' organizations?

The doctrinal answer to the "narrow-definition" question is simple. The government may selectively support civil-society institutions as long as there is a rational basis for believing that the institutions supported advance the government's goals more effectively than, or in a way different from, the ones that do not receive support. The Chamber of Commerce's anti-alcoholism program can receive selective support, for example, if there is a reasonable ground for believing that its program will reach a different, and more troubled, population of people disabled by alcohol than the veterans' association's program.

Rosenberger shows, of course, that this answer is not always correct. It holds that an exclusion from a program supporting expressive activities, predicated on the content of the civil-society institution's expression, is generally impermissible.⁹⁴ Yet a series of political-party cases shows that even the First Amendment's free speech provision sometimes does not bar selective support of civil-society institutions dedicated to expression. *Buckley v. Valeo* is primarily known for its effects on the modern campaign finance regime, but it also upheld selective public funding of political parties.⁹⁵ The statute creating the modern regime authorizes public support for presidential campaigns. It distinguishes among major, minor, and new parties.

Major parties are those that received more than twenty-five percent of the votes in the preceding presidential election. Major parties receive a significant subsidy. To the present, only the Democratic and Republican parties qualify as major parties.

Minor parties are those that received between five percent and twenty-five percent in the preceding election. Minor parties receive a subsidy in proportion to the votes they receive in the preceding election or in the one for which funding is provided, whichever is higher. The Reform Party qualifies for funding in the 2000 election. Minor parties that gathered fewer than five percent of the votes in the preceding election are reimbursed for some of their expenses only if they win more than five percent of the votes in the current election. Saying that the selective subsidies did not "unfairly or unnecessarily"

94. I insert the qualification to take account of the fact that groups whose expression were extremely troublesome—satisfied some very high standard of impropriety—could be excluded.

95. 424 U.S. 1, 85-108 (1976).

burden any party's "political opportunity,"⁹⁶ the Court found the exclusion of minor parties justified by, among other things, the important public interest against providing artificial incentives to "splintered parties and unrestrained factionalism."⁹⁷ The *Timmons* case discussed earlier reinforces the conclusion that legislatures may selectively subsidize civil-society institutions with an eye to stabilizing government when more broadly disbursed subsidies might destabilize it.⁹⁸

D. Providing Conditional Assistance

The programs of assistance to civil-society institutions described so far involve government decisions that say, in effect, "Here is some money to support you in your efforts to achieve some goal of which we approve. As long as your activities continue to be generally aimed to achieving that goal, the money will be available to you." These are programs of unconditional grants to civil-society institutions, because the institutions need not modify their existing activities to qualify for the public aid. Unconditional grants are uncommon. Far more frequently, the government specifies not only its general goal but also more particular conditions that recipients of assistance must satisfy. Complying with those conditions reduces the distance between the civil institution and the government, making it more like the government's partner and less like its potential adversary. I have argued that the government's power to structure civil society through selective unconditional grants is quite substantial. The possibility that civil-society institutions that receive government aid could serve as constraints or independent influences on government seems remote indeed if the government has power to impose significant conditions on grants.

How extensive, then, is the government's power to impose conditions on the grants it gives? The law of unconstitutional conditions is notoriously complex, even incoherent. Probably the best view is that there really is no general law of unconstitutional conditions, but only particular rules about conditions that do or do not violate specific constitutional provisions in connection with

96. *Id.* at 95-96.

97. *Id.* at 96 (internal citation omitted).

98. A decision by the Supreme Court of Ireland provides an interesting though obviously distinguishable contrast. In *In re Bunreacht Na hEireann*, [1996] 1 I.L.R.M. 81 (Ir. S.C.), the court held it a violation of the Irish Constitution for the government to spend money in support of one side in a pending referendum.

individual government programs.⁹⁹ However the problem is understood, though, the government plainly has a great deal of discretion about which conditions it may impose.

Here, I want to focus on a single concern, typically expressed in what have become minority views about the First Amendment's Establishment Clause. We can consider the concern in connection with the facts of *Agostini v. Felton*.¹⁰⁰ There, the Court upheld Title I of the Elementary and Secondary Education Act of 1965, which provided funds for remedial education and other services for students attending private schools in low-income areas. New York City used its Title I funds to send public school teachers into religiously affiliated schools to teach remedial classes. The city required that recipient schools remove all religious symbols from the classrooms used for these remedial classes. Is that an unconstitutional condition, and why should we worry about it anyway?

The law of unconstitutional conditions suggests that it may not be unconstitutional. A constitutional challenge might draw on the theme in unconstitutional conditions law that the government may not use conditions on its assistance to achieve indirectly what it could not achieve directly. It seems quite unlikely that New York City could direct religiously affiliated schools to remove religious symbols from their classrooms.¹⁰¹ A number of other themes in the cases point the other way, however. On one view, the doctrine is designed to ensure that governments act only to achieve constitutionally permissible goals, or at least that they act with good motives. The city wants the religious symbols removed so that no one could reasonably think that the city endorsed the school's religion.¹⁰² The classrooms are public classrooms, for the moment, and having religious symbols in a public school classroom would violate the Establishment Clause.¹⁰³ Finally, the requirement that religious symbols be removed

99. For a summary of this view, see STONE ET AL., *supra* note 43, at 1765 ("[T]here is no unitary unconstitutional conditions doctrine, but instead a set of results that depend on the particular constitutional provision at issue . . . [and] the question involves the meaning of the relevant provision . . .").

100. 521 U.S. 203 (1997).

101. Subject to the government's power to regulate a church's internal activities. *See supra* Section III.B.

102. At present, the Court holds that government actions that endorse religion violate the Establishment Clause. *See, e.g., County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 621 (1989).

103. *Cf. Stone v. Graham*, 449 U.S. 39, 42 (1980) (holding that the Establishment Clause bars states from requiring that copies of the Ten Commandments be posted in every public school classroom).

does not seem like an act that imposes a penalty on the exercise of a constitutionally protected right.

I need not determine which side of the argument is stronger. For now, the more important issue is: Why should the removal of the religious symbols be a matter of concern to someone seeking to understand the relation between the Constitution and civil society? Here, Establishment Clause history is instructive. One position, historically the Baptist tradition, is that interactions between government and religion corrupt both, but the corruption of religion is more important. An institution offered funds, but only if it complies with some conditions that might seem quite modest, might find itself seduced by the opportunity the offer provides. The schools in *Agostini* provided education to low-income students in part to express and advance their supporters' religious commitments. They might find removing religious symbols from a few classrooms a small price to pay for the opportunity to enhance the education they provide. But small steps taken one at a time can produce large changes.

Perhaps more interesting, the recipients may modify their religious commitments to explain to themselves why it is all right to remove religious symbols from the classroom. The thought here is that the schools put up the symbols in the first place because they thought that having a visible reminder of their religious commitment present before every student's eyes fit comfortably with their understanding of their religion's demands on people. When the symbols are removed, they may come to think that such visible demonstrations are not all that important anyway. The government's condition, that is, may subtly induce—not coerce—changes in religious commitment. And, finally, those changes may move the institution closer to government, reducing the constraining and empowering role we seek from civil society's institutions.

E. Conclusion

Across a wide range of areas, then, the government may use civil-society institutions to promote social stability. No doubt it *could* choose otherwise without violating the Constitution, and government might sometimes do so. It might act deliberately, as in funding "outsiders" because they might bring new and unexpected views to bear on matters of public concern. More interesting, it might inadvertently support civil-society institutions that disturbed the

government. For example, it might provide assistance to a religiously affiliated provider of services to the poor, believing that doing so served instrumental civil-society goals, and then it might discover that the church's preferential option for the poor, which generated its interest in providing those services, induced resistance to existing secular authorities. The government's constitutional *power* to use civil-society institutions in ways that is in tension with the goals that civil society's most enthusiastic supporters endorse nonetheless suggests that a realistic view of what government will actually do should be more temperate.

V. CONCLUSION: THE LIMITED CONSTITUTIONAL PROTECTION OF CIVIL SOCIETY

The Constitution provides some guarantees for civil society's institutions. But the constitutional doctrines I have addressed here do not, taken in the aggregate, do much to ensure that those institutions will be able to perform successfully the functions civil society's most ardent defenders give it, in the face of government unwillingness to respect the institutions.

Perhaps the picture I have sketched is too dark. I have not described structural features of the United States constitutional system that encourage, even if they do not mandate, the development of civil society's institutions. Federalism, for example, provides opportunities for relatively small groups of people to influence local governments. The coffeehouse proprietors mentioned in the Introduction might face zoning restrictions, but it might not be difficult for its patrons to get a zoning variance. Similarly, the separation of powers embedded in the Constitution on the national level and endorsed by tradition and state constitutions in the states provides people with many pathways they can use to influence government policy. Having so many opportunities, people acting in and through civil society's institutions might effectively influence and constrain the government.

In addition, although I believe it true that *contemporary* constitutional doctrine gives civil society a relatively small protected domain, I have no doubt that the Supreme Court could, without drastically revising any specific doctrinal area, interpret the Constitution to provide greater protection. But the chances of such reinterpretations taking hold are, I believe, rather small.

The first reason for my skepticism should be obvious. The courts

are themselves agencies of the state. The fact that federal judges have life tenure allows them to depart from the immediate political interests of those holding power elsewhere in the state. But the fact that they have been nominated by the President and confirmed by Senators makes it unlikely that those departures will be large, or, if large, sustained.

The second reason is more interesting. It is that, despite the rhetoric, few people are interested in promoting civil society *as such*. Everyone acknowledges that some civil-society institutions are pernicious.¹⁰⁴ Berger and Neuhaus write, for example, “[T]here are (to put it plainly) both good and bad mediating structures and . . . social policy will have to make this differentiation in terms of the values being mediated.”¹⁰⁵ And, from a quite different position, Jean Cohen “suspect[s] that only associations with internal publics structured by the relevant norms of discourse can develop the communicative competence and interactive abilities important to democracy.”¹⁰⁶

The bad institutions’ internal structures produce bad rather than good citizens, people who hope to use government to oppress others rather than to promote the public good. It is the very existence of such institutions that produces the impulse to regulate their internal activities and to deny them assistance available to other civil-society institutions.¹⁰⁷ The impulse to regulate rests on grounds that everyone acknowledges to be *formally* acceptable, which means that the only questions open to discussion and constitutional evaluation are whether particular regulations are aimed at the internal characteristics that make institutions pernicious and are targeted appropriately.

The most obvious conclusion to be drawn from this observation is that the concept of *civil society* does not work when we try to devise legal regulations predicated on the assertedly pernicious characteristics. The work is done by substantive criteria such as equality and fair dealing. Then, however, institutions are defended against regulation because they are egalitarian or satisfy other

104. The standard examples are the Ku Klux Klan and the so-called militia movement.

105. BERGER & NEUHAUS, *supra* note 4, at 150.

106. Cohen, *supra* note 1, at 21.

107. See BERGER & NEUHAUS, *supra* note 4, at 150 (“If . . . vouchers should become part of social policy, they should not be negotiable in schools run by . . . racist fanatics Such discrimination obviously creates certain problems, but they are not insuperable.”). The second sentence in this quotation understates the difficulty.

normative criteria, not because civil society's institutions should be defended.

Further, there will inevitably be disagreement over whether, how, and which institutions to regulate. As *Roberts* suggests, some will insist that the only civil-society institutions worth protecting are internally democratic and reasonably egalitarian. Others will respond that many traditional churches have strongly hierarchical structures and some inequalitarian features, but must be protected anyway. Consider the recent controversy over New York's effort to devise a scheme that would allow the handicapped children of the Satmar Hasidim residing in the village of Kiryas Joel to attend public schools where they would not face psychological pressure.¹⁰⁸ The constitutional analysis examined whether the state *could* assist the Satmar Hasidim. Many who thought that the Constitution precluded assistance, and some who thought that it did not, were troubled by the character of the Satmar Hasidim, believing that the group's internal organization made it unlikely to advance even indirectly the valuable goals they attribute to civil society.¹⁰⁹

Faced with this type of controversy, courts may invoke deferential standards of constitutional review. Even if they occasionally do not, the resulting doctrine is unlikely to provide a stable platform on which civil society's institutions can rest because the courts will surely reserve the power to *uphold* some regulations of institutions they find truly pernicious even if they invalidate regulations of other institutions.

Civil society's institutions may be valuable, and constitutional doctrine may recognize that value. I have argued, however, that there are reasons rooted in the structure of the state and of the arguments favoring civil society to be skeptical about how extensively it will do so. Experience could demonstrate that my skepticism is misplaced. People could organize *politically* to transform constitutional doctrine. Perhaps social mobilization can use the modest protection now provided civil society's institutions and amplify them. Institutions that are actually not protected by current doctrine might still generate

108. See *Board of Educ. of Kiryas Joel Sch. Dist. v. Grumet*, 512 U.S. 687, 690-95 (1994). The controversy continues. For the latest installment, see *Pataki v. Grumet*, 119 S.Ct. 2364 (1999) (staying a judgment barring the state from implementing a revised statutory scheme designed to achieve the result precluded by *Kiryas Joel*).

109. For an interesting exploration of this question, see Judith Lynn Failer, *The Draw and Drawbacks of Religious Enclaves in a Constitutional Democracy: Hasidic Public Schools in Kiryas Joel*, 72 IND. L.J. 383 (1997), and the response, Sanford Levinson, *On Political Boundary Lines, Multiculturalism, and the Liberal State*, 72 IND. L.J. 403 (1997).

enough power to transform the government. But these activities will take substantial effort, effort that those who believe civil society to be debilitated think unlikely to be forthcoming. Absent such efforts, the Constitution probably constitutes a civil society that is less vigorous than its advocates hope.

